A **SITI SHAMSIYAH AB KARIM & ORS**

v.

MELOMBONG & PERUMAHAN SDN BHD & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
NIK HASMAT NIK MOHAMAD JC
[SUIT NO: S-22-823-2003]
5 MARCH 2012

C ***CONTRACT:*** *Agreement - Sale and purchase agreement - Breach - Allegation of - Cause of action - Whether there was locus standi - Whether second defendant privy to contract between plaintiff and first defendant - Whether first defendant an agent for second defendant - Whether second defendant liable for representations made by first defendant* D *- Defendants failed to deliver luxury condominiums and did not conform to representation - Whether there was a breach of contractual terms and collateral representation - Whether plaintiffs succeeded in proving claim*

CONTRACT: *Misrepresentation - Sale and purchase agreement - Defendants failed to deliver luxury condominiums and did not conform to* E *representation - Whether there was a breach of contractual terms and collateral representation - Whether second defendant privy to contract between plaintiff and first defendant - Whether second defendant liable for representations made by first defendant*

F The plaintiffs were purchasers of condominium units in a housing development project ('the project'). The plaintiffs entered into the Sales and Purchase Agreements with the developer for the project, the first defendant, for the purchase of the condominium units as stated in the First Schedule of the SPA. In G advertisements relating to the project, the first defendant was described as a subsidiary of the second defendant, Talam Corporation Bhd, which was listed on the KLSE Main Board and had represented the second defendant as the principal party in the development of the project. The plaintiffs asserted that the H plaintiffs' purchase of the condominium units were based on the defendants' advertisements which stated that the project development was managed by the second defendant and that the units were to be built in accordance with the defendants' representation to the plaintiffs of the project development as a

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deluxe and luxurious condominium. Upon completion of the project and delivery of the vacant possession, the plaintiffs discovered that the units delivered to the plaintiffs were of low to medium cost apartments, did not conform to the defendants' representation of the units and was inconsistent with the description and specification provided in sch. 4 of the SPA. The plaintiffs thus alleged that the defendants had breached the SPA. As a consequence of the defendants' aforesaid breaches, the plaintiffs suffered loss and damages and claimed against the second defendant for general damages. The second defendant, however, contended that the plaintiffs did not have the *locus standi* in the plaintiffs' cause of action as the second defendant was not a party to the contract executed between the plaintiffs and their subsidiary, the first defendant. The second defendant contended that both parties had entered the SPA on a "willing buyer and willing seller" basis and that the condominium units were constructed, completed and delivered to the plaintiffs in accordance with the defendants' representation.

Held (allowing plaintiffs' claim):

(1) Despite not being the contracting party to the SPA, the second defendant through various advertisements of the project had consistently held out and represented to the plaintiffs that the said condominium project was the second defendant's project and had further represented that the project would be managed by the second defendant. Thus, although it is trite that a party who is not a party to a contract has no right to sue on contract, and despite the plaintiffs' execution of the SPA was with the second defendant's subsidiary, the second defendant was privy and accordingly, was a proper party to the plaintiffs' cause of action. (para 7)

(2) The second defendant was clearly and undisputedly a reputable housing developer and a leading player in the nation's housing development industry. The second defendant was a public listed company in the KLSE Main Board and that being a subsidiary of the second defendant, the first defendant company was merely an agent of the second defendant. The first defendant was clearly managed and controlled by the second defendant and the second defendant

as first defendant's holding company was actively involved in the business activities of the first defendant. Thus, notwithstanding that the second defendant owed separate existence from their subsidiary, the second defendant was liable for the representations made by the second defendant's agent, the first defendant, which induced the plaintiffs to execute the SPA. (paras 8, 9 & 11)

(3) The second defendant clearly breached cl. 12 of the SPA executed between the purchasers and the first defendant. The defendants had failed to deliver luxury condominiums as was promised to the purchasers and the units delivered did not conform to the defendants' representation and constituted a fundamental departure from what was represented to the purchaser plaintiffs. Further, the defendants' erroneous, inaccurate and overt representation of the project imposed clear legal liability on the defendants as defendants' representation encouraged and induced the plaintiffs into their respective purchases. There was thus a clear failure on the first defendant's part to construct and deliver to the plaintiff the units in accordance to the specification as described in sch. 4 of the SPA and in accordance with the second defendant's representation of the project in brochures and advertisements. (paras 4 & 5)

(4) Based on the testimony of the architect for the project, DW5, and the second defendant's building plan in exh. L2, the project was originally approved as a medium cost apartment and not as a luxurious condominium that had been promised and consistently represented to the plaintiffs. The plans were not shown to the purchasers and the plaintiffs did not possess any knowledge of the defendants' amended building plans. As the plaintiffs were unable to secure the plans from the defendants, the plaintiffs requested from the approving authority for copies of the project's building plans, P3. The second defendant could not challenge to verify the authenticity of P3 and accordingly accepted P3 as proof of second defendant's deviation from the project description. Accordingly, the second defendant was liable to the plaintiffs for the breach of the contractual terms pursuant to the said SPA and the breach of collateral representation made to the plaintiffs. (paras 17-20)

(5) The plaintiffs succeeded in proving their claim against the second defendant on a balance of probabilities. Based on the oral and documentary evidence adduced before the court, the second defendant as the holding company of the first defendant, was legally liable to the plaintiffs with the first defendant for the representation made to the plaintiffs in respect of the sale of the condominium units and their project development. (paras 21 & 22)

[General damages to be assessed.]

Case(s) referred to:

Hotel Jaya Puri v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

Len Min Kong v. United Malayan Banking Corp Bhd & Anor Appeal [1998] 2 CLJ 879 CA ***(refd)***

For the plaintiff - DP Vijandran; M/s DP Vijandran & Co

For the 2nd defendant - Ricky Tan (Marcus Chan with him); M/s Ricky Tan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nik Hasmat Nik Mohamad JC:

Background Facts

[1] The plaintiffs are the purchasers of condominium units in a housing development project known as Ampang Ultima of which upon the completion of the project is known as Ampang Damai. The plaintiffs for the period between 1997-2001 had entered into the sales and purchase agreements with the developer for the project, the 1st defendant, for the purchase of the condominium units on the dates and purchase prices ranging from RM119,880-RM178,400 as stated in the first schedule of "the SPA". The project was initially advertised by the 1st defendant as a condominium project but subsequently, since 1999 was advertised as "deluxe, big luxurious condominiums". In advertisements relating to the project, the 1st defendant was described as "a subsidiary of the 2nd defendant, Talam Corporation Bhd, listed on

the KLSE Main Board". The defendants in their advertisements of the project had represented the 2nd defendant as the principal party in the development of the project and that the project was managed by 2nd defendant.

[2] The plaintiffs assert that plaintiffs' purchase of the condominium units were based on the defendants advertisements which stated that the project development was "backed up" by the 2nd defendant and that the units were to be built in accordance with the defendants' representation to the plaintiffs of the project development as "big, deluxe and luxurious condominium".

[3] Upon completion of the project and delivery of the vacant possession, the plaintiffs however discovered that the units delivered to the plaintiffs were of low to medium cost apartments. The units delivered to the plaintiffs did not conform to the defendants' representation of the units and contained numerous defects, defective workmanship and, generally inconsistent with the description and specification provided in schedule 4 of "the SPA". The plaintiffs thus alleged that the defendants had breached "the SPA" as the defendants failed to build and deliver condominium with material, finishes, fittings and workmanship which conform to the defendants' representation of the project.

[4] As a consequence of the defendants' aforesaid breaches, the plaintiffs suffered loss and damages and claimed against the 2nd defendant, general damages, interests at the rate of 8% per annum on the general damages from date of the order to the date of full realization and costs as specified in para. 21(a), (b), (c) and (d) of the plaintiff's statement of claim.

2nd Defendant's Defences

[5] The 2nd defendant contend that the plaintiffs do not have any *locus standi* in the plaintiffs cause of action as the 2nd defendant is not a party to the contract which was executed between the plaintiffs and their subsidiary, the 1st defendant. The 2nd defendant deny that the plaintiffs' purchase of the condominium units were based on 2nd defendants' representation and further denied all of the plaintiffs' assertion as contained in para. 20 of the plaintiffs' statement of claim. The 2nd defendant contend that both parties had entered "the SPA" on a "willing

buyer and willing seller" basis and that the condominium units were constructed, completed and delivered to the plaintiffs in accordance with the defendants' representation and, the description stated in "the said SPA".

Judgment

[6] Based on oral and documentary evidence and written submissions from counsels for both parties, the court finds that the plaintiffs on a balance of probabilities have succeeded to prove plaintiffs' case against the 2nd defendant. Accordingly, plaintiffs' claim for general damages in para. 21 of the plaintiffs' summons and statement of claim is allowed with interests and costs with damages to be assessed.

Grounds Of Judgment

[7] It is clear to the court that in respect of the purchase of the condominium units, the plaintiffs had executed "the SPA" with the 1st defendant and not the 2nd defendant. However despite not being the contracting party to "the SPA", the 2nd defendant through various advertisements of the project as exhibited in exh. P5 had consistently held out and represented to the plaintiffs that the Bandar Baru Ampang Deluxe condominium project was 2nd defendant's project and had further represented that the project which was developed by their subsidiary, the 1st defendant would be managed by 2nd defendant. Thus, although It is trite that, a party who is not a party to a contract has no right to sue on contract, and despite the plaintiffs' execution of "the SPA" was with the 2nd defendant's subsidiary, the court finds that the 2nd defendant is privy and accordingly, is a proper party to the plaintiffs' cause of action.

[8] The defendant's advertisements as represented to the plaintiffs was that the 2nd defendant being a public listed company which is listed on the KLSE Main Board, would be the party responsible for the development and management of the 1st defendant's housing project. In this regard, defendant's witness DW3 had confirmed in court that the 2nd defendant is responsible for the project as stated in the defendants project's advertisements. It is also clear to the court that at the material time, 2nd defendant was clearly and undisputedly, a reputable housing developer and a leading player in the nation's housing

development industry. Further, PW2 and DW3 confirmed in court that the 2nd defendant is a public listed company in the KLSE Main Board and that being a subsidiary of the 2nd defendant, the 1st defendant company is merely an agent of the 2nd defendant.

[9] Based on the clear content of exh. P11 and P12, it is clear to the court that 1st defendant as the subsidiary of 2nd defendant is clearly managed and controlled by 2nd defendant and that the 2nd defendant as 1st defendant's holding company is actively involved in the business activities of the 1st defendant. PW2's testimony of 2nd defendant's relationship, management and control over 1st defendant is corroborated by documentary proof namely the company search report on 1st defendant and the 2nd defendant's annual reports for the years 1998, 1999, 2000, 2005 as exhibited in P7, which clearly listed the Bandar Baru Ampang housing project as the 2nd defendant's project. In the 2nd defendant's annual report of 2003, exh. P8, under the classification heading of "list of properties", the 2nd defendant is stated as the registered owner of the 1st defendant and in the "Edge Malaysia" magazine in exh. P10A, the 2nd defendant has included the housing project as one of their project.

[10] Based on the 2nd defendant's annual report of 2003 (exh. D9), the 1st defendant is evidently a part of the corporate structure of the 2nd defendant where the 2nd defendant is stated to hold 92.2% of the 1st defendant's shares which effectively render the 1st defendant a wholly owned company of the 2nd defendant. It is thus clear to the court that the 1st defendant whose principal activities are property development is a wholly owned subsidiary of 2nd defendant. In this regard it is trite that despite their separate existence, 1st defendant as a subsidiary company of the 2nd defendant may be regarded as an agent of the parent company, based on the principle decided in the case of *Hotel Jaya Puri v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32. When dealing with the rule on corporate personality, Salleh Abas FC:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the Court has in a number of cases, bypassed this principle, if not made inroads into it. The court seemed quite willing to lift 'the veil of

incorporation' (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the Court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* ...

[11] Thus, notwithstanding that the 2nd defendant owe separate existence from their subsidiary the 1st defendant, as the 1st defendant and 1st defendant's project development is clearly managed and controlled by the holding company the 2nd defendant, the court accordingly, finds the 2nd defendant liable for the representations made by 2nd defendant's agent, the 1st defendant which induced the plaintiffs to execute "the SPA".

[12] It is further clear to the court that in the purchase of the condominium units, the plaintiffs were sufficiently induced and had significantly relied on the defendants' advertisements that stated the 1st defendant, "a subsidiary of Talam Corporation Bhd (1120-H) (Listed on the KLSE Main Board) as the developer for the project as in exh. P4. In this regard, the 2nd defendant had however contended that 41 out of 69 of the plaintiffs could not have been induced into the purchase of the condominium units, as the sales and purchase agreements were executed prior to the advertisements referred to in exh. P5. It was further submitted by the defendant that PW2 could not give evidence for the 68 plaintiffs as he had no knowledge of the actual representation made by the defendant, particularly as five of the plaintiffs have disposed their units and no longer has the *locus standi* in the plaintiffs' claim.

[13] In this regard, PW2, who gave evidence on behalf of other purchasers, confirmed in court that he had signed and executed "the SPA" with the 1st defendant based on the defendants' representation that the project was wholly backed up by the 2nd defendant. PW2 stated that he saw the advertisements of the project in the newspapers which clearly stated the 1st defendant as a subsidiary of the 2nd defendant and that the project is managed by 2nd defendant. According to PW2, when he went to the 2nd defendant's office to sign the letter of offer, he was pointed out by the sales representative of the defendants to the brochures and wall displays which stated the project as that of 2nd defendant. PW2 confirmed that he was further assured by 2nd defendant's sales representatives that the 2nd defendant was

responsible for the 1st defendant's project. PW2 further confirmed that the plaintiffs would not have entered "the SPA" with the 1st defendant without the 2nd defendant's representation that 2nd defendant would be responsible for the project. The court thus finds that in the purchase of the condominium units, the plaintiffs had relied and were sufficiently induced by the 2nd defendant's representation. The 2nd defendant is thus accordingly liable to the plaintiffs for their failure to build and deliver to the plaintiffs the condominium units in accordance with the specification, collateral assurances and representation to the plaintiffs.

[14] The 2nd defendant clearly breached cl. 12 of "the SPA" which were executed between the purchasers and the 1st defendant during the period of 1997 - 2001. According to "the SPA", the 1st defendant had agreed to build the condominium units in accordance with the plans and specification as stated in the 4th schedule. Based on the testimony of PW2 the plaintiffs had relied on the defendant's advertisements dated 4 December 1999, 5 May 2000, 29 July 2000, 13 January 2001 and 20 January 2001, in their purchase of the condominium units, as exhibited in exh. P5. Based on the evidence of PW1 and PW1's report as in P2, it is clear to the court that the defendants had failed to deliver a luxury condominium as was promised to their purchasers and that the units delivered did not conform to the defendants' representation and constitute a fundamental departure from what was represented to the purchaser plaintiffs. The construction of the condominium clearly did not conform to the plans and specification that were represented by the defendants to their purchasers as contained in schedule 4 of "the SPA". Further, the defendants' erroneous, inaccurate and overt representation of the project imposed clear legal liability on the defendants as defendants' representation encouraged and induced the plaintiffs into their respective purchases. In the case of *Len Min Kong v. United Malayan Banking Corp Bhd & Anor Appeal* [1998] 2 CLJ 879, the Court of Appeal relied on the judgement of Raja Azlan Shah CJ Malaya and quoted at p. 19 as follows:

> In our view those cases are strong authority for the preposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement ...

[15] There was thus, a clear failure on the part of the 1st defendant to construct and deliver to the plaintiff the units in accordance to the specification as described in schedule 4 of "the SPA" and in accordance with the 2nd defendant's representation of the project in brochures and advertisements. Based on the testimony of PW1 and report which contained list of defects as in exh. P2, it is clear that the defendants did not comply with the specification that had been represented to the plaintiffs in the defendants' advertisements. PW1's clear and unwavering testimony on the non compliance and inconsistencies with the prescribed specification as described in his report in exh. P2, confirmed defendants' departure and non compliance from the specification as stated in the original approved building plan exhibited in P3.

[16] In this regard, PW2 confirmed in court that the approved building plan for the project is the plan exhibited in P3, which was officially obtained after the completion of the construction of the project, on 8 March 2002 from the approving authority, the Majlis Perbandaran Ampang Jaya. Further, based on the testimony of the architect for the project, DW5, and the 2nd defendant's building plan in exh. L2, it is confirmed that the project was originally approved as a medium cost apartment and, not as a luxurious condominium project. DW5 concede in court that the amended building plan as in L2 had reduced the quality of the condominium units from a "deluxe, big, luxurious condominium" to, "Rumah Pangsa Sederhana/Medium Cost Apartment".

[17] It is therefore clear to the court that based on the amended building plan of L2 as was produced by defendants' own architect, the plans were clearly intended for the construction of medium cost apartment and not the luxurious condominium units that had been promised and consistently represented to the plaintiffs. Further, DW5 had confirmed in court that there was no reduction in the quality of workmanship but DW5 however concede that the 2nd defendant's amended building plans as in exh. L2 had reduced the quality and standard of the project from a luxurious condominium to a medium cost apartment.

[18] The court therefore accepts the plaintiff's contention that the project was based on the original approved plan for the project as approved in 1991 and exhibited in P3, which had formed the basis of the defendant's representation to the plaintiffs. The plans were clearly made prior to the defendants' amended

A plan in L2 and were clearly the only original plan provided by the approving authority for the project, the MPAJ. The approved plans as in exh. P3 is consistent with the plaintiffs' assertion of defendants erroneous representation that the 2nd defendant's project development is that of a luxurious condominium with
B superior fittings and workmanship.

[19] In this regard, despite the production of the defendants' amended building plans by the 2nd defendant's architect, DW5, it is clear to the court that the plaintiffs' and the plaintiffs' solicitor
C were informed of the existence of the aforesaid amended building plans. The plaintiffs were not alerted of the changes in the building plan description and specification which had reduced the quality and standard of the project development from that of a big, deluxe, and luxurious condominium to a medium cost apartment.
D As conceded by DW4, the plans were not shown to the purchasers and the plaintiffs did not possess any knowledge of the defendants' amended building plans. It was further confirmed by PW2 that the plaintiffs had approached the defendants for the plans and, as confirmed by DW4 the defendants had refused and
E or failed to furnish such plans. As the plaintiffs were unable to secure such plans from the defendants, the plaintiffs requested from the approving authority for copies of the project's building plans as in P3. The court accordingly dismisses defendants' challenge to verify the authenticity of P3 and accordingly accepts
F P3 as proof of 2nd defendant's deviation from the project description.

[20] It is reasonable for the court to infer that the plaintiffs did not have any knowledge that the approved building plan in respect
G of the defendants' project did not correspond with the defendants' description and representation to the plaintiffs as contained in their brochures, pamphlets and advertisements. Accordingly, the defendant is liable to the plaintiffs for the breach of the contractual terms pursuant to "the said SPA", and the
H breach of collateral representation made to the plaintiffs to construct and deliver condominium units with superior finishes, fittings and workmanship befitting the description as luxury condominium project.

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[21] Therefore, based on the reasons alluded to above, the court is of the view that the plaintiffs succeeded to prove their claim against the 2nd defendant on a balance of probabilities and accordingly allowed plaintiffs claim in para. 21 of the plaintiffs statement of claim. The plaintiffs succeeded to prove that based on the oral and documentary evidence adduced before the court, the 2nd defendant as the holding company of 1st defendant is legally liable to the plaintiffs with the 1st defendant for the representation made to the plaintiffs in respect of the sale of the condominium units and their project development.

[22] As to the assessment of damages, the court noted that PW1's report as in exh. P2 contained guidelines and basis for the computation and assessment of damages which is fundamentally premised on the original building plan produced by the plaintiffs, as exhibited in exh. P3. Accordingly, the court ordered for general damages to be assessed.